No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,
VS.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY BRIEF OF PETITIONER

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I

NEITHER RESPONDENT NOR REAL PARTY IN INTEREST ADEQUATELY JUSTIFY DENIAL OF CONSTITUTIONAL PROTECTION OF THE PUBLIC'S RIGHT OF ACCESS TO PRELIMINARY HEARINGS

Respondent and real party in interest fail to provide any supportable justification for precluding the public's First Amendment right of access to preliminary hearings. The thrust of both parties is that access to preliminary hearings cannot be granted as a matter of constitutional

right because to do so would jeopardize the defendant's right to a fair trial. This does not follow.

As this Court has acknowledged, circumstances may exist in a particular case warranting overriding the public's constitutional right of access in order to assure the defendant's right to a fair and impartial trial. However, as this Court also has recognized, the instances where the defendant's Sixth Amendment right competes and possibly conflicts with the public's First Amendment right are extremely rare, both at the trial stage as well as the pretrial stage. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Nothing presented by either respondent or real party in interest refutes the fact that the interests of the defendant can be properly accommodated by the standards set by this Court in prior decisions.

A. That the Preliminary Hearing Does Not Involve a Final Adjudication of Guilt or Innocence is Irrelevant

Respondent and real party in interest's contention that the First Amendment right of access should not extend to preliminary hearings simply because these hearings do not involve a final adjudication of guilt or innocence is without merit. Neither party explains why this fact alone should preclude constitutional protection of the public's right of access. While the preliminary hearing is not a final adjudication of guilt or innocence (indeed, the trial itself may not be the final phase either), it is nonetheless an adjudicatory proceeding which seriously impacts on the criminal prosecution.

At the preliminary hearing the magistrate determines which charges will be prosecuted and, indeed whether prosecution will continue at all. Without a right of access to this hearing, the public will have no opportunity to

determine independently whether further prosecution is warranted.[1]

Also, to contend that the constitutional right of access is limited only to proceedings involving the final adjudication of guilt or innocence is inconsistent with the decisions of this Court. In *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), the Court recognized that the constitutional right of access extends to the selection of the jury, notwithstanding the fact that the jury selection process clearly is not the final adjudication of guilt or innocence. Nonetheless, this Court determined that as the jury selection was an important part in the effective and fair administration of criminal justice, the public had a constitutional right of access to that proceeding. Similarly, in *Waller v. Georgia*, 467 U.S. 39 (1984), while not

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[1]For example, the Los Angeles District Attorney has recently decided not to prosecute five of the seven defendants in the *McMartin* case after a 14-month open preliminary hearing. This announcement by the district attorney's office came after the magistrate had determined that there was probable cause to hold all seven defendants for trial. Los Angeles Times, January 18, 1986. But for the fact that the preliminary hearing in the *McMartin* case was open, the public would have had no opportunity to evaluate not only the magistrate's determination of probable cause but also the district attorney's decision not to prosecute.

Contrasted with the *McMartin* case is the situation which occurred in the case of *People v. Angelo Buono*, Los Angeles Superior Court Case No. 354-231, commonly referred to as the "Hillside Strangler". In that case, after a 10-month closed preliminary hearing held under the old *Penal Code*, Section 868, and the determination of probable cause by the magistrate, the district attorney sought dismissal of the charges because of the credibility of a key witness. The trial court refused to dismiss the action and the prosecution was ultimately turned over to the state attorney general. Because the public was precluded from attending the preliminary hearing, it had no opportunity to evaluate independently the credibility of the key witness, nor to evaluate the district attorney's request for dismissal.

deciding the First Amendment issue, this Court determined that the hearing on a motion to suppress evidence, which also does not involve a final adjudication of guilt or innocence, must be open unless closure is justified under the standard set in *Press-Enterprise*.

The public's constitutional right of access must extend to the preliminary hearing because it is an important component in the effective and fair administration of criminal justice to which the recognized societal and structural values embodied in public access apply.

B. Characterizing a Proceeding as "Accusatory" Phase or "Final" Adjudication Does Not Aid in Determining the Public's Constitutional Right of Access

Respondent, while not questioning the values of open judicial proceedings, raises the spectre of open grand jury proceedings and public access to the district attorney's office by characterizing the preliminary hearing as part of the "accusatory" phase as opposed to the adjudicatory phase of criminal prosecution. Respondent fails, however, to provide any historical, legal, or common definition of "accusatory." Respondent also fails to delineate where a criminal prosecution would change from accusatory to adjudicatory. Using the everyday meaning of accusatory, the entire prosecution remains accusatory up to the time, at the earliest, when the matter is submitted to the jury for a verdict. Indeed, the criminal prosecution remains accusatory until all appellate review has been exhausted.

Characterizing the preliminary hearing as an accusatory process — contended to be analogous to the grand jury — overlooks that it is a *judicial* proceeding. A determination by this Court that the values of open judicial proceedings apply to preliminary hearings would not inevitably lead, as claimed by respondent, to open grand jury proceedings or ready access to the district attorney's

investigations. The grand jury is, in California, an arm of the prosecution. *Hawkins v. Superior Court*, 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). The extent of the public's constitutional right of access to non-judicial, investigatory proceedings is clearly beyond the scope of the issues presented in this petition and cannot be used to deny the public a constitutional right of access to preliminary hearings.

Similarly, real party in interest's contention that the constitutional right of access should only extend to proceedings which involve a "final" adjudication is indefinite and confusing. Real party in interest characterizes proceedings such as the trial, hearings on motions to suppress evidence, demurrers, motions to dismiss, and motions for change of venue as proceedings involving this undefined "final" adjudication. If by "final" real party in interest means an end to the prosecution, he is clearly incorrect. While any one of these proceedings could in fact terminate the prosecution, the same is equally true of the preliminary hearing. One reason the right of access should not be limited to the trial is the fact that the criminal prosecution could in fact be terminated as a result of any one of these earlier judicial proceedings. Thus, characterizing proceedings on the basis of "finality" fails to aid in determining the public's constitutional right of access.

C. Deference To The State Court For The Resolution Of This Case Is Unwarranted

It is undisputed that this Court is the final arbiter of constitutional matters. Yet both respondent and real party in interest argue that this Court should defer to the state court's determination of the proper accommodation of United States Constitutional rights. This position is without support. Deference to a state's determination

cannot limit judicial inquiry when First Amendment rights are at stake. *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

Real party in interest argues that the states are free to interpret their own state constitutional rights more expansively than federal constitutional rights. Even if this point were conceded, such state interpretation must be overruled should it violate United States Constitutional rights. *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980).

Further, deference to the state court's interpretation of its state's constitution is not an issue in this case. The California Supreme Court standard for closure was not based on any expansive interpretation of a state constitutional right. Rather, it was based on a misinterpretation of this Court's prior decisions and on the erroneous conclusion that the public has no First Amendment right of access to preliminary hearings. Accordingly, in setting the standard for closure under *Penal Code,* Section 868, the supreme court failed to give proper recognition to the public's constitutional right and, thus, allowed for closures in violation of that right.

Contrary to the suggestion of real party in interest, remand to the California Supreme Court is not warranted. Petitioner has not contended that *Penal Code,* Section 868 is unconstitutional. This statute clearly provides for open preliminary hearings except when necessary to close the proceeding in order to protect the defendant's Sixth Amendment right. Petitioner does contend that the California Supreme Court's interpretation of Section 868 is constitutionally impermissible.

Only this Court can determine the proper accommodation between the defendant's Sixth Amendment right and the public's First Amendment right. Once this Court

establishes the standard for accommodating these rights, the state cannot impose a slighter standard or a more stringent standard for closure. Thus, nothing further could be accomplished by remanding this case to the state court.[2]

D. Potential Pretrial Publicity Cannot be Used To Deny a Constitutional Right of Access

Both respondent and real party in interest argue that the dangers of pretrial publicity are reason enough for denying constitutional protection for the public's right of access to preliminary hearings.

But, as aptly illustrated in the brief of Amici Curiae *American Newspaper Publisher's Association, et al.,* pretrial publicity and its effect on the defendant's right to a fair trial is a non-concern in the vast majority of criminal cases. Even in cases of substantial pretrial publicity such as John DeLorean, John Hinkley, Claus Von Bulow, Dan White, Maurice Stans, John Connally, Angela Davis, Watergate and Abscam, there was no showing that adverse pretrial publicity in any way affected the jury's ability to render a fair and impartial verdict. As set forth more fully in amici's brief, studies have shown that, notwithstanding pretrial publicity, jurors are able to put aside information received prior to trial, as well as personal biases and prejudices, and render decisions based on the evidence presented at trial.

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[2]Both parties imply that because the states have a wide variety of criminal proceedings, this Court cannot arrive at a rule of general application in this case without interfering with the state's control over its criminal justice system. This position is untenable. An opinion from this Court establishing the public's First Amendment right of access to preliminary hearings does not impose upon the states an obligation to follow any procedure for criminal justice. Rather, it would require that the states recognize and protect the public's constitutional right of access.

As Amici ACLU, itself dedicated to the cause of personal liberties, points out, the alleged conflict between the public's First Amendment right and the defendant's Sixth Amendment right is overstated. A choice between these rights is unnecessary in an ovewhelming number of cases. In most instances, public access serves to *ensure* the defendant's right to a fair trial.

This Court's standard requiring a showing of an overriding interest and an absence of alternatives adequately accommodates those rare instances where pretrial publicity demonstratively will affect the defendant's Sixth Amendment right. There is, however, no adequate alternative for protecting the public's right of access and the values embodied in that right if judicial proceedings are closed.[3]

Using prejudicial pretrial publicity, which is of no concern in most cases, as a basis for denying the public a First Amendment right of access, points up the danger of using variables to establish a right. Rights must be determined on constants, not variables. In this case, the sole constant is that access to judicial proceedings furthers important societal and structural values already identified by this Court. Variables noted by respondent and real party in interest include pretrial publicity. In most cases this would not be a threat; in some it might. But the variables should be dealt with by issuing guidelines in applying constitutional rights exactly as this Court has done in *Press-Enterprise,* 464 U.S. 501; *Globe*

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[3]The transcript of the proceedings is not an adequate alternative to access to the proceeding in the first instance. *Gannett Co. v. DePasquale,* 443 U.S. 368, 441, n.17 (1979) (Blackman, J., concurring in part.)

Newspaper, 457 U.S. 596, and *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). Using the possibility of harm or any other variable as a basis for denying a constitutional right of access would allow for unnecessary and easy closures, causing irreparable harm to the values underlying this right.

II

THE TRIAL COURT'S SUBSEQUENT RELEASE OF THE TRANSCRIPT CANNOT BE USED TO JUSTIFY THE INITIAL DEPRIVATION OF THE PUBLIC'S CONSTITUTIONAL RIGHTS OF ACCESS

Respondent attempts to use the trial court's later release of the transcript as justification for its initial action in refusing to unseal the transcript. Nothing in the trial court's subsequent action illustrates that the trial court recognized the public's constitutional right of access or considered any alternatives other than a complete ban on such access. The fact that the trial court ultimately released the transcript when defendant was unable to show even the slightest possibility of prejudice to his fair trial right does not mean its earlier action was constitutional. More importantly, the issue here is no longer the trial court's action but rather that of the supreme court's denial of a First Amendment right of access.

III

THE PUBLIC'S FIRST AMENDMENT RIGHT OF ACCESS EXTENDS TO JUDICIAL PROCEEDINGS WHERE ACCESS WOULD FURTHER THE STRUCTURAL AND SOCIETAL VALUES

Respondent and real party in interest acknowledge that access to judicial proceedings furthers societal and struc-

tural values. They acknowledge the propriety of constitutional protection for the right of access to various judicial proceedings. But neither can accept protection for access to preliminary hearings.

Respondent attempts to deny public access to the preliminary hearing by asserting, without support, that this proceeding is held exclusively for the benefit of the accused, that it is not intended to benefit the public. Real party in interest claims that only proceedings which involve a so-called but undefined "final" adjudication carry a constitutional right of access. Real party in interest even argues that a preliminary hearing may include portions which should be presumptively open and therefore it could be open and closed as necessary to accommodate the public's right of access. (Real party in interest's brief, p. 38, fn. 24.) Such a fragmented approach to the question of the right of access compels petitioner to reexamine the basic reasoning behind the constitutional right.

Open judicial proceedings are essential to the integrity of our judicial system. *Globe Newspaper,* 457 U.S. at 606. Openness helps to insure fairness and the appearance of fairness by acting as a check on all government officials and by insuring that all participants in the court proceeding perform their duties conscientiously and fairly. *Waller v. Georgia,* 467 U.S. 39. Additionally, open judicial proceedings serve to educate the public and lead to a more informed discussion of the functioning of our judicial system. *Globe Newspapers,* 457 U.S. at 604; *Richmond Newspapers,* 448 U.S. at 572.

These are constant values which this Court has recognized as the basis of the public's First Amendment right of access to judicial proceedings. Nothing in the nature of these values compels the conclusion that the public's First Amendment right is restricted to the trial which is

only one part of the criminal prosecution. Nothing in the nature of these values precludes a constitutional right of access to the preliminary hearing. If the public is precluded from evaluating this earlier stage of the criminal prosecution, a proceeding which vitally affects the trial phase, the public's right of access to the trial itself will have little meaning.

The criminal judicial process is less a pure adversarial contest than it is the test of the prosecution's case. Frequently the defense will offer little or no evidence at either the preliminary hearing or at the trial itself.[4] The real objective, in both instances, is to put the prosecution to its proof. The fact that this is the "moment of truth" for the prosecution is one of the compelling reasons for allowing the public access to the proceedings. There is no real difference under this rationale between the preliminary hearing and the evidence-taking portion of the trial itself. In both instances, the prosecution's evidence is being tested. Indeed, the need for public access to the preliminary hearing, is perhaps more significant since these judicial proceedings do not have the additional protection afforded by the presence of the jury. See, e.g., *Williams v. Florida,* 399 U.S. 78, 100 (1970) (quoting *Duncan v. Louisiana,* 391 U.S. 145, 159 (1968)).

Real party asserts that the public's concern for fairness can be adequately protected by the presence of the accused and counsel as well as the judicial tribunal. Real party contends that the public must depend upon the participants themselves for the proper and fair administration of justice at all times prior to the trial. This proposition shows a gross misunderstanding of human

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[4]In fact it is not uncommon for the "trial" to consist solely of the preliminary hearing transcript. California Department of Justice, Bureau of Criminal Statistics, 1978.

nature, of the intimidation caused by authority exercised under cover, and of the way people perceive that assurances of fairness are not a sham. Worse, it fails to understand or follow the clear reasoning of this Court in several cases in its recognition of a First Amendment right of access. "[T]he sure knowledge that anyone is free to attend gives assurances that established procedures are being followed and that deviations will become known." *Press-Enterprise,* 464 U.S. at 508.

Without constitutional protection for the public's right of access, the recognized values of access are in jeopardy. When California became a state, its first laws did not provide for closure of preliminary hearings. The second session of the Legislature then established closure at the simple request of the defendant. In 1983, the Legislature gave Californians a right of access which the supreme court limited by allowing for closure if there was a reasonable likelihood of substantial prejudice. Unless this Court pronounces a constitutional right, the state is free to change yet again and eliminate or further circumscribe the public's right. The values of access are far too important to be subject to such inconsistent treatment.

CONCLUSION

Petitioner seeks recognition by this Court that when the values of openness attach to a judicial proceeding, so must the constitutional right of access. Specifically, petitioner seeks to establish a constitutional right of access to preliminary hearings.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 19, 1986, I served the within Reply Brief of Petitioner in re: "The Press-Enterprise Co. v. The Superior Court of the State of California" for County of Riverside in the United States Supreme Court, October Term 1985, No. 84-1560;

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 19, 1986, at Los Angeles, California

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